SBC Communications Inc.
Legal Department

September 19, 2002

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: ERRATUM
Reply Comments of SBC Communications Inc.
CC Docket 01-338

Dear Ms. Dortch,

Attached please find the corrected version of **Reply Comments of SBC Communications Inc.** in the above referenced docket. Please accept this document for filing in lieu of the Reply Comments submitted in the Commission's Electronic Comment Filing System September 18, 2002.

Should you have any questions, feel free to contact me on 202-326-1942.

Sincerely,

/s/ Anisa A. Latif
Anisa A. Latif
SBC Communications Inc.
Legal Department
1401 Eye Street, NW, Suite 400
Washington, D.C. 20005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local	)	
Exchange Carriers	)	
	)	
Petition for Forbearance of Verizon	)	
Telephone Companies	)	
Pursuant to 47 U.S.C. §160(c)	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

CORRECTED VERSION

In its Petition for Forbearance, Verizon demonstrated that Section 10 of the Act requires the Commission to forbear from applying any provision of Section 271 requiring a Bell Operating Company to provide a facility or service that the Commission determines does not meet the mandatory unbundled network element standard under Section 251(d)(2). As SBC demonstrated in its Comments in support of Verizon's Petition, the record in this proceeding and the requirements of Section 10 of the Act require that the Commission grant Verizon's Petition with respect to all Bell Operating Companies.

Some carriers, relying on Section 271(d)(4), suggest that the Commission lacks authority to forbear from enforcing the competitive checklist items of Section 271.[1] The Commission should flatly reject this suggestion as fundamentally incompatible with the language of both Sections 10 and 271(d)(4). Section 10 is a mandatory forbearance requirement encompassing the entire Act, including all of the provisions of Section 271. It thus specifically directs the

Commission to forbear from applying "***any*** provision of this Act." 47 U.S.C. § 10(a)(emphasis added). Moreover, subsection 10(d) specifically confers authority upon, and—by virtue of its reference to subsection 10(a)—affirmatively directs the Commission to forbear from applying the requirements of Section 271, provided that the Commission determines that such requirements have been fully implemented and that the requirements of subsection 10(a) are satisfied. The suggestion that Section 10 does not confer authority upon the Commission to forbear from applying the competitive checklist provisions of Section 271 is thus impossible to square with the plain terms of Section 10.

Nor is Section 271(d)(4) a more specific statutory provision on the issue of Section 271 forbearance that trumps Section 10, as alleged by AT&T.[2] Section 271(d)(4) contains no reference at all to forbearance (or Section 10) and thus in no way countermands the specific statutory requirement that the Commission forbear from the requirements of Section 271 when the requirements of Section 10 have been satisfied. Indeed, Section 10 is much more specific on this subject than Section 271(d)(4); *only* Section 10 pertains to forbearance specifically in reference to the requirements of Section 271.

Nor are Sections 10 and 271(d)(4) in any way inconsistent. The most reasonable interpretation of section 271(d)(4) — indeed, the only reasonable interpretation of that provision — is that it precludes the Commission from modifying the section 271 checklist *in its consideration of a Section 271 application*. The legislative history of this provision confirms that this is the correct construction. The Joint Explanatory Statement of the Committee of Conference squarely states: "New section 271(d) sets forth administrative provisions regarding

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[1] *See, e.g., AT&T Comments* at 1, 6, 8; *CompTel Comments* at 2.
[2] *AT&T Comments* at 8.

applications for BOC entry under this section."[3] Once an application has been granted, Section 271(d)(4) is moot.

Section 10 at most precludes the Commission from forbearing from Section 271 requirements prior to or in its consideration of a Section 271 application, insofar as Section 10 provides that the Commission may not forbear from applying the requirements of Section 271 until those requirements have been fully implemented. Once a Section 271 application has been granted, however, and the Commission concludes that the requirements of Section 271 have been satisfied, *ipso facto,* Section 271 has been fully implemented for the state in question. Therefore, at a minimum, neither Section 271(d)(4) nor Section 10(d) precludes the Commission from forbearing from the requirements of any of the provisions of Section 271 after a Section 271 application has been granted.

Some carriers argue that the "fully implemented" language in Section 10 requires a finding of a functioning wholesale market for the facilities or services at issue.[4] The Commission should reject such an interpretation. The fundamental purpose underlying the Section 271 competitive checklist is to support the determination that a Bell Operating Company's local market is open to competition. There is no basis for insisting on the presence of a wholesale market as a pre-condition to determining that local markets are open to competition. Moreover, it would defy all logic to conclude that a market in which numerous carriers use their own facilities to provide local retail service—as the facts demonstrate in this proceeding—is not competitive simply because none of the carriers offers any of those facilities as wholesale services to other carriers. The only reasonable interpretation of Section 10(d), is

[3] Thus, subsection 271(d), of which subsection 271(d)(4) obviously is a part, is entitled, "Administrative Provisions."

that it confers authority upon the Commission to forbear from the requirements of any Section 271 provision once the Commission approves a Section 271 application.[5]

Of course, as with any Section 10 analysis, the Commission also must conclude that forbearance from the Section 271 requirement at issue meets the requirements of Section 10(a). A finding that a particular network element should not be unbundled under Section 251 must necessarily drive the conclusion that the requirements of Section 10(a) have been satisfied for any Section 271 requirement for the provision of facilities or services corresponding to that element.

The record in this proceeding supports a determination that competitors are not impaired without access to, and the Commission should thus not require mandatory unbundling under Section 251(c)(3) of: (1) certain loops, (2) transport, (3) switching, or (4) signaling. That determination is based upon the competitive availability — well documented in the record of this proceeding — of the facilities in question. The availability of the facilities and services allowing competitors to provide local retail service is the touchstone for a determination that the local market is open to competition. And, as the Commission has repeatedly affirmed, competition is the best mechanism for protecting consumers. The competitive availability of a checklist item thus best provides the consumer protections contemplated by Section 10(a). Any additional requirement would do no more than add regulatory burdens and unnecessary costs without any corresponding consumer benefits.

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[4] *See AT&T Comments* at 2, 12; *CompTel Comments* at 3; *PACE Coalition Comments* at 11; *WorldCom Comments* at 12.

[5] Apparently, even AT&T is not convinced by its argument that the Commission lacks authority to forbear from applying the provisions of Section 271. In another section of its comments, AT&T admits that the Act allows the Commission to eliminate "general access to the specific facilities listed in section 271(c)(2)(B)," provided that "the BOC satisfies the far more stringent standard for forbearance from section 271." *AT&T Comments* at 6.

Indeed, it is the additional regulatory burdens imposed by mandatory unbundling requirements that lie at the heart of Section 10, and, specifically, the public interest component of Section 10. Not surprisingly, the CLEC commenters casually dismiss the public interest in eliminating overbroad unbundling requirements, even going so far as to argue that the argument that unbundling creates disincentives to investment "defies common sense."[6] That argument, however, was at the heart of the decision of the United States Court of Appeals for the D.C. Circuit, which specifically found that "***[e]ach unbundling of an element*** imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[7] (emphasis added) There simply should be no dispute at this point that unbundling imposes costs on ILECs, on CLECs, and on telecommunications and high-tech markets generally. There should be no dispute, moreover, that the Commission must account for those costs, whether in determining which elements should be unbundled for purposes of Sections 251(d)(2), or in evaluating a petition for forbearance. The imposition of those costs warrants forbearance once the Commission determines that the facilities and services in the competitive checklist are competitively available.

Finally, if the Commission determines that forbearance is not warranted in this instance, it should, nonetheless affirm that Section 271 does not require the continued provision of UNE-P after any of the individual components of UNE-P are no longer required under Section 251, and that the facilities and services required under the competitive checklist are not subject to the pricing requirements of Section 252(d)(1). With respect to UNE-P, some commenters have suggested that the competitive checklist requires the continued provision of UNE-P under

[6] *PACE Coalition Comments* at 7.

Section 271, even if one or more of the components of UNE-P, *e.g.*, switching, are no longer required to be provided as unbundled network elements under Section 251.[8] There is no statutory basis for that notion, and the Commission should summarily reject it.

The Commission rules relied upon to support the required provision of UNE-P are 47 C.F.R. §§ 51.315(b) and (c). The statutory authority relied upon by the Commission in issuing those rules is Section 251(c)(3) of the Act.[9] Section 251(c)(3) provides that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services." Neither Section 271 or any other provision of the Act, however, contains any corresponding requirement to provide the facilities or services required under the competitive checklist in a manner that allows requesting carriers to combine those facilities or services in order to provide telecommunications services.

Accordingly, Section 271 does not require the continued provision of UNE-P if any of the individual components of UNE-P are not required to be provided as unbundled network elements under Section 251. If the Commission thus determines that forbearance is unwarranted in this instance, it should nonetheless determine that the competitive checklist requires ***only*** the provision of the discrete facilities and services—*e.g.,* local loop transmission, local switching, and local transport—identified in the competitive checklist, and not pre-assembled combinations of those facilities and services.

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[7] *United States Telecom Association, et al., v. Federal Communications Commission, et al.,* 290 F.3d 415, 427 (D.C. Cir. 2002) (citations omitted).

[8] *See AT&T Comments* at 10; *PACE Coalition Comments* at 4-5, 8.

[9] *See Local Competition Order*, at ¶¶ 293-294.

In addition, if the Commission determines that forbearance is unwarranted for any of the competitive checklist items, it should once again reject the suggestion by some commenters that the facilities and services required by any of those items should be priced under Section 252(d)(1), *i.e.,* at TELRIC.[10] As even AT&T agrees,[11] and as the Commission has previously determined,[12] the terms and conditions, including price, for access to the facilities required by the competitive checklist are different under Sections 251 and 271. Thus, the rates for the facilities and services required under the competitive checklist must be evaluated under Sections 201(a) and (b), rather than 252(d)(1).[13] Accordingly, if the Commission determines that forbearance is unwarranted, it should nonetheless affirm its prior determination on this issue and reject the suggestion that prices for the facilities and services required under the competitive checklist must adhere to the pricing standard for unbundled network elements in Section 252(d)(1).

Respectfully submitted,

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[10] *See PacWest Comments* at 21; *WorldCom Comments* at 7-9; *Sprint Comments* at 15-16.

[11] *AT&T Comments* at 6.

[12] *UNE Remand Order,* ¶ 470.

[13] *Id.*

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of **Reply Comments of SBC Communications Inc.** has been served on the parties below via first class mail – postage prepaid on this 19th day of September 2002.

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